(16,198)

Supreme Court of the United States

OCTOBER TERM, 1897.

No. 134.

J. B. SHEPARD, PLAINTIFF IN ERROR,

vs.

FRANK ADAMS, RECEIVER OF THE COMMERCIAL NATIONAL BANK OF DENVER.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

On August 24, 1895, the defendant in error filed his complaint in an action at law upon a promissory note in the District Court of the United States for the District of Colorado, and sued out of said court what was called a writ of summons against the plaintiff in error. The so-called summons was served on the defendant within the county of Arapahoe, Colorado, on August 27, 1895. The statutes of Colorado at the time said summons was issued and served, and at all times since then, prescribed that "the summons shall state the parties to the action, the state, county and

court in which it is brought, and require the defendant to appear and answer the complaint within *twenty days*, if served in the county in which the action is brought. * * * If a copy of the complaint be not served with the summons * * * *ten days additional* to the time specified in the summons shall be allowed for appearance and answer." The summons in question was such a writ as was prescribed by this statute of Colorado, except in this one particular, that it required the defendant named therein "to appear and demur or answer to the complaint filed in said action in said court *within ten days* (exclusive of the day of service) after" service thereof, if served within the county of Arapahoe, instead of allowing him *thirty days* after service of summons (no copy of the complaint having been served) in which to appear.

It was not through inadvertence that the time for appearance and answer was curtailed to ten days, but by reason of a general rule and settled policy of the Federal District Court. Under a rule adopted October 10, 1877, and ever since in force, a summons issuing from that court, in cases like the one at bar, must require the defendant to appear and answer in *ten days* after service. This rule was so framed that, at the time of its adoption, it complied, in this and in all other particulars, with the statute of Colorado, adopted March 17, 1877. When the Colorado statute was changed by the state legislature, in 1889, and the summons thereby required to allow *twenty days*, and if no copy of the complaint was served, *ten days additional*, for the appearance of defendants, the Federal District Court for Colorado did not change its rule of October 10, 1877. It has ever since maintained it, regardless of the state statute.

On September 4, 1895, and within ten days after the service of the summons in this case, the defendant in the court below, appearing specially for that sole purpose, filed a motion to quash the summons, and alleged as ground for said motion that the summons was not such a summons as is prescribed by the statutes of Colorado. This motion was denied, November 5, 1895, and, the defendant refusing to answer or plead, default was entered and judgment rendered against him, according to the prayer of the complaint. A bill of exceptions was granted and signed and a writ of error allowed to this court.

The question certified to this court by the said District Court for decision is, "As to whether said summons was in compliance and accordance with the provisions of the statute of the state of Colorado relating to 'process,' as it is provided by the statute of the United States it should be."

SPECIFICATION OF ERRORS.

The plaintiff in error relies upon the following errors assigned:

First—That the court erred in overruling the defendant's motion to quash the summons issued herein.

Second—That the court erred in rendering judgment against the defendant, according to the prayer of the plaintiff's complaint.

BRIEF OF ARGUMENT.

I.

The question is one of jurisdiction: the Supreme Court and not the Circuit Court of Appeals is the proper tribunal to review this cause.

Section 5 of the Appellate Courts Act of March 3, 1891, provides: "That appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"1. In any case in which the jurisdiction of the court is in issue; in which cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision, etc."

Had not the district judge expressed the belief, at the time he signed the bill of exceptions, that the question involved here was not within the meaning of the term "jurisdiction," as used in the above act, no authorities would have been cited here upon that point.

This court, in United States vs. Arredondo, 6 Pet., 709, said: "The power to hear and determine a cause is jurisdiction." No such power exists in a personal action without jurisdiction of the court over the person of the defendant. The mode of obtaining jurisdiction of defendants prescribed by the Code is exclusive. If it is not followed, the court has no jurisdiction over the defendant and is therefore powerless to hear and determine the cause. This has been clearly recognized by this court in many decisions. In Rhode Island vs. Massachusetts, 12 Pet., 657, 718, it was said: "Jurisdiction is the power to hear and determine the subject-matter in controversy *between parties to a suit*, to adjudicate or exercise any judicial power over them." There (page 721) the initial question considered by the court, and the one which it said must be determined before it could proceed with the cause, was whether the court had jurisdiction of the parties.

In Earle vs. McVeigh, 91 U. S., 503, 507, this court decided that the judgment there reviewed was void, because the service of summons was not in compliance with the state statute, and said: "Standard authorities lay down the rule that in order to give any binding effect to a judgment, it is essential that the court should have jurisdiction of the person and subject-matter."

Brown, in his work on Jurisdiction, says (section 5): "Jurisdiction may be divided into three elementary parts. The court must have jurisdiction over the subject-matter of the suit or controversy; it must have jurisdiction over the person of the defendant; and if the action concerns a thing, it must have jurisdiction over the thing."

In Wells on Jurisdiction, page 71, it is said: "Where a statute prescribes the mode of obtaining personal jurisdiction, it must be strictly pursued or the proceeding will be a nullity, whether in a superior or inferior court, and as utterly void, indeed, as if it undertook to adjudicate where it had no jurisdiction of the subject-matter."

The Supreme Court of Indiana held in Robertson vs. State, 10 N. E. Rep., 582, that "Two things are absolutely essential to the power of a court to decide a legal controversy: jurisdiction of the subject-matter and jurisdiction of the person. Both must exist, otherwise it is the imperative duty of the court to decline to do more than ascertain and declare that it has no power to examine or decide the merits of the controversy."

The Circuit Court of Appeals for the sixth circuit, in U. S. vs. Swan, 65 Fed. Rep., 647, 649, decided

that the first paragraph of the act of March 3, 1891, quoted above, did not apply to a question of whether a suit could be entertained on the equity or the law side of a Federal District or Circuit Court, but applied only "to the initial questions of the jurisdiction" of such courts "over the subject-matter *and parties.*"

The Supreme Court of the United States, in So. Pac. Co. vs. Denton, 146 U. S., 202, reviewed, upon a writ of error granted under the Court of Appeals act, the question of the lower courts' jurisdiction over the defendant.

This court also, while not directly deciding the point in issue here, In re Atlantic City R. Co., 17 U. S. Sup. Ct. Rep., 208, recognized the question of the jurisdiction of the court over the defendant, as such a question of jurisdiction as is meant by the Circuit Court of Appeals act.

All "jurisdiction," as the word is used in the part of the act above quoted allowing writs of error directly from the District or Circuit Courts to the Supreme Court, is necessarily the "jurisdiction" of some court; and the words "of the court" added to "jurisdiction" in the act in no way change or limit the general meaning of the term. It is necessary to the "jurisdiction of the court" that it have jurisdiction of the person as well as the subject-matter.

The Circuit Court of Appeals for the seventh circuit, in Davis & Rankin Co. vs. Barber, 60 Fed. Rep., 465, held that where the jurisdiction of the lower court was the only matter in issue, the Court of Ap-

peals had no jurisdiction on appeal or writ of error, and that the case should have been taken directly to the Supreme Court.

It seems clear that the question here is one of jurisdiction within the Circuit Court of Appeals act; and that this court has exclusive jurisdiction of this cause on writ of error.

II

"The writ of summons issued by a Federal District Court should conform to the state statute."

Section 914 of the Revised Statutes of the United States (act of 1872) provides, that "The practice, pleadings and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the Circuit and District Courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such Circuit or District Courts are held, any rule of court to the contrary notwithstanding."

The form and substance of the writ by which a court acquires jurisdiction of the person of the defendant is clearly a matter of "practice" and of "form and mode of proceeding," and so within the purview of section 914.

In Amy vs. Watertown, 130 U. S., 301, 302, it was stated that "The principal question in this case is, whether the defendant, the city of Watertown, was served with process in the suit so as to give the court below jurisdiction over it;" and it was said, (page 304): "There can be no doubt, we think, that the mode of service of process is within the categories

named in the act." The form and substance of the process itself is as clearly a matter of "practice, pleading and form and modes of proceeding" as the mode of service of the process.

In the Watertown case this court decided that "the statute of 1872 (section 914) is peremptory, and whatever belongs to the three catagories of practice, pleading and forms and modes of proceeding, must conform to the state law and the practice of the state courts, except where congress itself has legislated upon a particular subject and prescribed a rule." (Page 304.)

Furthermore, this court there held (page 320): "Here we are bound by statute and not by the state statute alone, but by the act of congress, which obliges us to follow the state statute and state practice. The federal courts are bound hand and foot, and are compelled and obliged by the federal legislature to obey the state law."

The purpose of the act of 1872, of which section 914 is a part, was to bring about uniformity in the procedure of the federal and state courts of the same locality. (Nudd vs. Burrows, 91 U. S., 426, 441.) If the District Court can arbitrarily maintain its rule under which the time of defendant's appearance in the summons in this case was limited to ten days, when the Colorado Code of Procedure provides thirty days, it can disregard all the practice provisions of the state Code. The result would be, great confusion and inconvenience. This court, in Nudd vs. Burrows, *supra*, in discussing section 914, said (page 441): "It had its origin in the Code enactments of many of the states. While in the federal tribunals

the common law pleadings, forms and practice were adhered to, in the state courts of the same district the simpler forms of the local Code prevailed. This involved the necessity on the part of the bar of studying two distinct systems of remedial law, and of practicing according to the wholly dissimilar requirements of both. The inconvenience of such a state of things is obvious. The evil was a serious one. It was the aim of the provision in question to remove it."

The case at bar comes within both the letter and the reason of the act of 1872.

In the following decisions of this court it has been held that section 914 applies to, and that the state statute therefore governs:

The method of service of process on an agent of a foreign corporation:

McCormick Harvester Mach. Co. vs. Walters, 134 U. S. 41.

Societe, etc., vs. Milliken, 135 U. S., 304, 307.

The mode of service of summons by posting:

Earl vs. McVeigh, 91 U. S., 503, 507.

The filing of amended petitions:

Henderson vs. Louisville R. Co., 123 U. S., 61.

The construction of pleadings:

Robertson vs. Perkins, 129 U. S., 233.

The sufficiency of pleadings:

Roberts vs. Lewis, 144 U. S., 653.

The bringing of suit by the real party in interest:

Arkansas Smelting Co. vs. Belden Co., 127 U. S., 379, 387 (Colo.).

Delaware Co. vs. Diebold Safe Co., 133 U. S., 473, 488.

The federal Circuit and District Courts have generally recognized the binding force of section 914 in matters like the one under consideration. In the cases cited below they have held that it applied, and the state statute, therefore, controlled:

What the summons should contain:

An indorsement (required by New York statute) of a reference to the statute under which a suit for penalty was brought—was omitted, and the summons, therefore, was void.

U. S. vs. Rose, 14 Fed. Rep. 681.

The validity of service of process:

The federal court, it was said in the case cited below, has no more power to authorize any mode of service, other than that provided by the state statute, than have the state courts. "The mode of service prescribed by the state law must be followed, and the power of this court to prescribe or substitute any other mode is necessarily abrogated."

Perkins vs. Watertown, 5 Bissell, 320.

The requirements for opening judgment taken by default:

Republic Insurance Co. vs. Williams, 3 Bissell, 370.

The time of giving notice for a hearing:

Rosenback vs. Dreyfuss, 2 Fed. Rep., 23.

The time of filing pleadings:

Ricard vs. Inhabitants, etc., 5 Fed. Rep., 433.

The verification of pleadings:

Collier vs. Stimson, 18 Fed. Rep., 689.

The issuance of the writ of replevin, which was not allowed by the state statute of Virginia:

Baltimore & Ohio R. Co. vs. Hamilton, 16 Fed. Rep., 181.

The District Court had no power to issue a summons which directly contravened the explicit and mandatory provisions of both the federal and state statutes. Section 914 bound it to comply with the state statute as completely as any state court is bound by the state statute.

III.

The so-called summons in this case was a nullity, and did not confer upon the District Court any jurisdiction over the defendant.

The summons in question was issued August 24, 1895. (Transcript of Record, page 3.) Section 34

of the Colorado Code of Procedure, in force at that time, and ever since, was enacted, in its present form, in 1889, and is as follows:

"Sec. 34. The summons shall state the parties to the action, the state, county and court in which it is brought, and require the defendant to appear and answer the complaint within *twenty days* after the service of summons, if served in the county in which the action is brought; or if served out of such county or by publication, within thirty days after the service of summons, exclusive of the day of service or that judgment by default will be taken against him according to the prayer of the complaint, and shall briefly state the sum of money or other relief demanded in the action; but the summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading. If a copy of the complaint be not served with the summons, or if the service be made out of the state, *ten days additional* to the time specified in the summons shall be allowed for appearance and answer, but the form of the summons shall be the same in all cases." (Transcript of Record, page 6.)

The Supreme Court of Colorado has decided that this section of the Colorado Code, before its amendment in 1889, was mandatory, and that a summons which did not comply with it was void. The amendment of 1889 did not change its mandatory character.

Smith vs. Aurich, 6 Colo., 388, 390.

A. T. & S. F. R. R. Co. vs. Nicholls, 8 Colo., 188, 191.

In each of the cases cited above the summons did not state "the cause and general nature of the action," as required at that time by this section of the Code. It was, therefore, held that the summons was a nullity and did not confer any jurisdiction upon the court issuing it. At the time these cases were decided by the Supreme Court of Colorado, the Code provision, in positive and peremptory terms, required that the summons should state "the cause and general nature of the action." The amendment of 1889 wholly omitted that particular requirement, and further provided that the "summons shall not be considered void or erroneous on account of an insufficient statement of the relief demanded, unless the same is manifestly misleading." But in respect to the time of answering, the amended act of 1889 is as positive and peremptory in its language, as was the prior act in providing that the cause of action should be stated in the summons. The language construed by the state Supreme Court in the decisions cited above was: "The summons shall state * * * the cause and general nature of the action." The language of the act of 1889, upon which plaintiff in error relies, is: "The summons *shall state* the parties, etc. * * * and *require* the defendant to appear and answer the complaint within twenty days. * * * If a copy of the complaint be not served with the summons * * * ten days additional to the time specified in the summons *shall be allowed* for appearance and answer."

It is plain that the amendment of this section in 1889 does not in any way warrant an inference that the Supreme Court of the state would construe the present statute as otherwise than mandatory, or

would consider it less essential that the summons should comply with the statute.

In Burkhardt vs. Haycox, 19 Colo., 339, that part of the present act relating to the statement of cause of action in the summons was construed; the summons there under consideration clearly complied with the act of 1889, and was held to be good, but nothing was there said which militates against the former decisions of the court, in Smith vs. Aurich, and A. T. & S. F. R. R. Co. vs. Nicholls, *supra*.

That the Supreme Court of the United States will, in the construction of state statutes, follow the adjudications of the highest court of such state, is too well settled to require citation of the cases so holding.

Could any Colorado state court maintain the validity of the summons in this case? The statute is mandatory. Its mandate is that the summons "shall require the defendant in such cases to appear and answer within *thirty days*. This summons requires appearance and answer in *ten days*. If the time could be so changed, it could be made one day. If the time could be changed, any other requirement could also be changed—all others could be changed. The summons would thus become the creature of the whim and caprice of the court issuing it. It would no longer be statutory.

In Smith vs. Aurich, *supra*, the Colorado Supreme Court cited with approval Lyman vs. Milton, 44 Cal., 630, in which case the caption of the summons omitted the name of one of the defendants, and in lieu of the name the words "et al." were inserted. The California Supreme Court held the Code provis-

ion requiring the summons to state "the parties" to be mandatory, and it was said that if any one statutory requirement might be omitted, all might be omitted. The Colorado court adopted this reasoning.

The state Supreme Court has decided that while said section of the Code is mandatory, still a substantial compliance therewith is sufficient. (Kimball vs. Castagnio, 8 Colo., 525.) The defect in that case was merely formal--the omission of the words "judgment by" before "default." The meaning was the same and the summons was sustained.

In the case at bar there is not a substantial compliance with this section of the Code. There is a direct violation of its express terms. The most important office of a summons is to command the defendant to appear and answer the plaintiff. The Colorado Code says that command shall be to appear within thirty days. This is the initial command in the suit. It lies at the very threshold. If courts are not bound to make this command comply with the statute, they may omit from the summons all things required by the statute; they may change it in every particular prescribed.

In Smith vs. Aurich, *supra*, the state Supreme Court very clearly indicates *its opinion on the particular point in issue on this review*. It cites with approval, and as one of the authorities upon which it bases the decision that the summons in that case was void, the case of Hochlander vs. Hochlander, 73 Ill., 618. That was a case in which the *time for answer* stated in the summons was different from that required by the Illinois statute; it was not returnable to the next term after its date, as the statute provided. The summons

was held, for that reason, to be without force and to confer no jurisdiction. It is manifest that the decisions of the Colorado court of last resort condemn the summons in the case at bar.

There is a decided preponderance of authority in favor of the proposition that statutory provisions specifying what the summons shall contain are mandatory and must be complied with, or the summons is void.

Wells on Jurisdiction of Courts, section 82, page 71.

Brown on Jurisdiction, section 41, page 109.

In each of the following cases the summons was held to confer no jurisdiction because of the violation of the statutory provisions in the particulars mentioned:

Culver vs. Phelps, 130 Ill., 217.

Returnable at time other than that provided by statute.

Simmons Bros. vs. Cochran, 29 S. C., 31.

Time for appearance more than twenty days from date. It is said in this decision: "If a trial justice had the right to disregard the act as to the time fixed in the summons for a day or for three days, as here, why not also for a month or year?"

Adkins vs. Moore, 20 S. E. (S. C.), 985.

Statutory time for appearance and answer changed.

Joiner vs. Delta Bank, 14 So. (Miss.), 464.

Returnable instanter instead of on first day of term.

Miner vs. Francis, 58 N. W. (N. D.), 343.

No time for appearance specified. Code required "seven days after service."

Raub vs. Otterback, 16 S. E. (Va.), 933.

Returnable "before the ..... of our said Circuit Court" in nine days instead of ten.

Pantall vs. Dickey, 16 A. Rep. (Pa.), 789.
Mead vs. Hartwell, 31 N. Y. S. Rep., 675.

Returnable at other than the statutory time.

Hodges vs. Brett, 4 G. Greene (Iowa), 345.
Gas Co. vs. Wheeling, 7 W. Va., 22.
Briggs vs. Snegan, 45 Ind., 154.
Shirley vs. Hager, 3 Blackf. (Ind.), 225.
Carey vs. Butter, 11 Ind., 391.
Fuller vs. Ind., etc., R. Co., 18 Ind., 91.

Time for defendant's appearance a departure from that provided by statute.

Crowell vs. Galloway, 3 Neb., 215.

Returnable on *first* Monday after date of summons instead of *second* Monday. The court said: "No discretion is vested in either the clerk or the court in respect to the return or answer days, and if the plain requirements of the statute be disregarded, it is the right of the defendant to object, and thus challenge the jurisdiction of the court over him," and if not for subsequent appearance these facts "would call for reversal of the judgment."

Sidwell vs. Schumaker, 99 Ill., 426, 433.
Forbes vs. Darling, 94 Mich., 621, 625.
McLendon vs. State, 92 Tenn., 520, 523.

Writ did not run in name of The People of the State.

Insurance Co. vs. Holland, 6 Wall., 556.
Choat vs. Spencer, 40 Am. St. Rep. (Mont.), 425.

Seal of court omitted from the writ.

It seems clear to us that any court of the state of Colorado must have quashed such a summons as was issued in this case—must have held it to be a nullity. If so, the Federal District Court ought to have granted the motion to quash. It had no jurisdiction to render judgment against defendant. As was said in Amy vs. Watertown, 130 U. S., 302, in such matters as this: "The federal courts are bound hand and foot, and are compelled and obliged by the federal legislation to obey the state law."

When the District Court for Colorado adopted its rule 3 (Transcript of Record, page 5) providing that the summons should require the defendant to answer in ten days, it was so done in compliance with the Code of Colorado of 1877. (Transcript of Record, page 6.) Section 914 of Revised Statutes of United States then required that the rule should conform to the state statute. If it was incumbent upon that court to make its summons conform to the state satute then, it is now. The fact that by this rule it has overridden the statute for many years does not make the rule right or lawful; does not make a summons in violation of the statute valid.

IV.

The special appearance of defendant in the court below was not a waiver of the illegality of the summons.

Harkness vs. Hyde, 98 U. S., 476.

Mexican Cent. R. R. Co. vs. Pinkney, 149 U. S., 194, 209.

Goldey vs. Morning News, 156 U. S., 518.

It is respectfully submitted that the summons in this case did not confer upon the District Court jurisdiction over the defendant below, and that the judgment should therefore be reversed.

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